

# WILLS: A PRACTICAL GUIDE

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# THE PURPOSE OF THIS BOOKLET

The purpose of this book is to give you a basic understanding of the key issues related to preparing a will in Ontario. Obviously, it is not legal advice and it is not a substitute for legal advice.

All estate law is local, and of its time. This book is about the law of Ontario, as it stands in January 2016. The law in other places can be very different. The law in Ontario will change.

This booklet is a high level summary of key principles in lay terms. It does not cover every situation, and it is deliberately written to be accessible and is not written in careful legal language.

## **Wills: normally straightforward but not simple**

For most people, preparing a will should be ‘straightforward but not simple’.

Preparing a will is never simple, because of thought that needs to go into making sure that the great many possible issues and contingencies are dealt with. However, for most people most of the time, most of these issues do not apply to their circumstances or needs and thus, in the end, do not need to be dealt with in the will. Accordingly, most people do not need a very complex will.

On the other hand, for most people, if they get good legal assistance, preparing a will should be quite straightforward. Once you get a handle on the process, and the issues that you need to make some decisions about, and make a proper list of all of your assets, your lawyer should be able to assist you to document your wishes in a will relatively quickly and at reasonable cost.

This little guide is intended to give you an understanding of the key issues that need to be dealt with in a will. For most people, if you understand the issues in this book and how they apply to your situation, then drafting your will can indeed be straightforward and accomplished quickly and cost-efficiently.

# **NO WILL = BIG DIFFERENCE**

## **(OFTEN, NO WILL = BIG MESS)**

In Ontario, when you die without a will (“intestate” or “intestacy” are the formal legal phrases), virtually every aspect of your estate is different from the norm if you had made a will.

Key differences include:

- who can/should apply for probate;
- who will be responsible for administering your estate; and,
- who will inherit what.

## **Who should have a will? Every adult.**

There is no excuse for not making a will unless you have a strong desire to inflict an expensive mess on your family.

In particular, you absolutely must make a will if:

- you are recently married;
- you are separated but not divorced. If not, it is very likely that your ex-spouse will be the administrator of your estate and will inherit some or all of your estate;
- if you are not legally married but live common law with a spouse. If you do not, it is very likely that your common law spouse will not inherit anything, and your estate may pass to your parents or children (or former spouse!) instead.

If you do not have a will, the cost to your estate will usually be at least several thousand dollars in extra expense, not to mention the pain and cost to your executor, spouse, and family that poor planning will inflict.

# THE BASIC RULES

## Testamentary Freedom

The basic rule in Ontario is that the testator (the person who makes the will) has almost complete freedom to decide who they want to be the executor of their estate, and how they want their estate distributed. Ontario does not have any over-arching Wills Variation Act (as some other places do), nor do testators have to be 'fair' or 'treat their children equally'.

This rule of testamentary freedom is subject to a few key exceptions.

## Wills & Marriage & Divorce

A will is automatically revoked upon your subsequent marriage, unless the will was made in contemplation of the marriage (ie. Specifically referred to the marriage and your intention that the will remain valid after the marriage).

A will is **not** automatically revoked by a divorce. Instead, it is read as if your ex-spouse died immediately prior to your death. Generally, if you get divorced, you should immediately do a new will and revoke all prior wills.

## Rights of spouses and ex-spouses and dependants

It is not wise to ignore your spouse, former spouse, or dependants in your will.

Your **married** spouse has the right, on your death to elect:

- To receive from your estate in accordance with your will (for instance, if your will gives everything to your spouse), or
- Under the Family Law Act, to receive from your estate as if you had been divorced immediately prior to your death.

In other words, if you give less in your will to your spouse than they would be entitled to in a divorce, then it is likely that they will in effect 'challenge the will' and make the election that permits them to receive as if you were divorced.

Note: a common law spouse does **not** have this right in Ontario.

If you owe a duty to support a former spouse, then this duty likely forms a debt due by the estate. If it does, it must be paid before there is any estate available for distribution to beneficiaries (for instance, your new spouse or children). The precise nature of your debts and the consequences for your estate will depend on the terms of any agreement with your former spouse or Court order.

In Ontario, you have a duty to make adequate provision for certain dependants in your will, such as a dependent spouse (married or common law). If you do not, they can make a claim against the estate for support. Note that in order for someone to qualify for support, they must have been dependant on you financially prior to your death. This is a complex area of the law – if you want to reduce or eliminate what someone receives from your estate and they are dependent on you, get good legal advice.

# EXECUTOR

## **Note: see our other e-Book**

The description below is to assist you, when drafting your will, to choose an appropriate executor. It is not a complete description of the duties and role of executors. Much more information is found in our eBook, *Executor Duties: A Practical Guide*.

## **Choose carefully: being an executor is a job not a favour**

The executor is the person tasked with administering your estate in accordance with your will.

Being an executor is a demanding job that requires skill, integrity and judgment. It is not easy, or quick, or just a favour.

Choosing an executor is not about choosing who is nicest or closest to you.

At the best of times being an executor requires a lot of paperwork and handling forms and money. The executor needs to collect assets (eg. clean out your house and arrange to have it sold), invest funds prudently, hire and instruct professionals like lawyers and accountants, open and close bank accounts, and complete and file probate forms and tax returns. The executor needs to send and receive considerable correspondence, get advice, make decisions, and keep detailed accounting records throughout. The executor needs to be detail-oriented, prudent, but decisive, and able to carry on the task for months and perhaps several years. Make sure that you choose someone who has the right skills and aptitude.

## **Location**

It is not a requirement that your executor be resident in Ontario, but it makes life easier. In particular, as a general rule, appointing an executor who does not live in Canada or Britain can make the probate process more difficult and expensive. It is even possible that the Court may refuse your chosen executor, and instead appoint someone in accordance with the default provisions of the *Succession Law Reform Act*. If you have assets in more than one jurisdiction you should consider multiple wills (see Multiple Wills).



## **Compensation**

Being an executor is a demanding job. Executors are commonly compensated (in rough terms 5% of the value of the estate).

## **Avoid conflicts of interest**

It is very important not to choose an executor who will automatically be in a conflict of interest. This is guaranteed to create distrust and often creates acrimony and disputes. These disputes can destroy families!

For instance, if one of your children lives with you, and the others do not, generally it is a bad idea to choose the live-in child as the sole executor of your estate because they will have a large conflict of interest related to dealing with the house.

## **Successors**

Wills can last a long time. Someone who was a perfectly suitable executor at one time, may no longer be able or willing to act many years later. You should name at least one alternate executor.

## **Consider using a professional**

Unless you have a relative or friend who happens to enjoy filing legal forms and doing taxes and accounting, we strongly recommend that you consider appointing an independent professional who is not a beneficiary of the estate to be the executor. Often, this will get the job done 'better, faster' and without the risk of poisoning family relationships. In addition, many professionals, especially trust companies, will have made arrangements to have someone ready, willing and able to fill the role when the time comes.

# GUARDIANSHIP

Most parents with a child under 18 name a guardian for that child to cover the possibility that on the parent's death the child's other sibling(s), if any, is/are unable or incapable of looking after the child.

## **The Courts retain ultimate authority**

The appointment of a guardian in a will is only binding for 90 days. The Courts - not parents - retain the ultimate authority to appoint a guardian of a child.

Obviously, the expressed wishes of the parent are an important factor that the Courts will consider, but it is just one of many factors that will be considered.

## **Key points to remember**

- For some families, the choice of guardian is obvious. For many others, the choice is very difficult. There is no shame in that, but do not let it derail the whole process. It is better to have a will that does not address guardianship than to have no will at all.
- Who is most suitable can vary on a number of factors, including the age and development of the child, and the most suitable guardian for your child can change over time. Remember, guardians age too!
- Guardianship can be difficult, and can consume a lot of emotional and financial resources. Make sure that your proposed guardian has the ability and capacity to look after for the child.
- If you can, make sure that you provide sufficient resources for the guardian to provide for your child. Seriously consider adding compensation for the guardian.
- Make sure that the potential guardian agrees to accept the appointment.

# BENEFICIARY DESIGNATIONS

Some assets, such as insurance and RRSPs pass to the beneficiary named in the policy or plan. Unless the named beneficiary is you, or your estate, these assets will usually pass directly to the named beneficiary **and will not form part of the estate**. This is a common strategy for trying to reduce probate taxes, but unless a) you are giving everything to your spouse, or b) you have a well thought out plan, it can be a mess.

## **Warning: taxes!**

Having assets pass directly to named beneficiaries is a common strategy for reducing probate taxes and executor fees. However, it is not without risk if the beneficiary is anyone other than your spouse who is also the principal beneficiary of your estate. It can result in some real unfairness. For instance, unless you roll your RRSP over to your spouse or disabled child, the entire value of your RRSP is brought into your income in the year of death and forms part of your taxable income in that year. This can result in you having a very high income and your estate having very high income tax payable. However, if the named beneficiary of the RRSP is not your estate, that individual will receive 100% of the RRSP *without any deduction for the taxes payable*. The liability for the tax will be borne by the estate (and thus the beneficiaries of the estate) and not at all by the beneficiary of the RRSP.

# JOINT OWNERSHIP

**Joint ownership with spouse = likely good; joint ownership with adult child = very risky!**

If you own an asset (for instance a house or bank account) **in joint tenancy with a right of survivorship** with your spouse then on your death 100% of that asset should belong exclusively to the other joint owner. The asset will not be part of your estate, and no probate is necessary.

This can be a very efficient and effective way to hold assets, especially with your spouse (whether married or common law).

However, joint ownership with an adult child is a whole other matter:

1. Unless the child can prove that you intended to give the asset to them, the asset is deemed to form part of your estate and is subject to probate. Jointly owned bank accounts and houses are an invitation for family disputes and expensive litigation. If you really want to make a gift to an adult child, you absolutely must document your intention, and better yet, you should probably give them the asset outright and not retain a joint interest in it.
2. A lot of nasty income tax consequences can be triggered from a poorly documented gift to an adult. For instance, if you give your house to your child, then you can no longer claim the principle residence exemption for sheltering from capital gains taxes, any increase in its value after the date of gift, and unless it is the child's principal residence, all gains will be taxable.

If you want to put any property in joint tenancy with anyone other than your spouse, get good legal advice. The advice of a bank teller is not good legal advice. If you want to make arrangements so that an adult child can pay your bills, use a properly drafted power of attorney for property, not a joint bank account.

# LEGACIES & BEQUESTS

The meat of the will is ‘who gets what’. There are two primary strategies for setting out who gets what from your estate:

- The ‘pool then split’ strategy, which involves pooling all assets, paying all expenses and all specific bequests, and then dividing the monetary value of the balance (the residue) among the beneficiaries in ‘shares’; or
- The ‘named gift’ approach, which involves giving specific assets (or the proceeds from specific assets) to specific beneficiaries.

For instance:

- “give my daughter, Jane, my RRSP, and give my son John, my house” is a ‘named gift’ or ‘specific bequest’ type of disposition.
- “sell my assets, pay my debts, and then divide the residue equally between my daughter Jane and my son John” is a ‘pool then split’ approach.

## Warning

Generally, the ‘pool then split’ approach has a much higher chance of being ‘fair’ or ‘in keeping’ with your original intentions, because the ‘named gift’ approach often fails to deal with who pays what debts and expenses (such as taxes and executor fees). For instance, in the example above, if there were no other assets besides the RRSP and the house, all of the executor fees would be paid by Jane from the RRSP and none by John from the house.

## Don’t over-complicate

Complex legacies can really complicate the process of applying for probate, and administration of the estate.

## Gifts to minors

We understand the desire to leave a legacy directly to some children, especially grandchildren. However, gifts to children make a) probate, and b) estate administration considerably more difficult and expensive. Any gift over \$10,000 requires getting the Office of the Children’s Lawyer involved, and lengthy trusts can impose on the trustee (often the executor) long term

duties to manage money for the children. To reduce cost and hassle consider gifts that take the form of contributions to RESPS or directly to a parent of the child.

## **Philanthropy**

Bequests to charities are a fundamental part of estate planning. We recommend them.

However, some key points to consider include:

- Make sure that you identify the charity properly; use the full proper legal name;
- Make the gift clear and simple;
- Get advice to make the gift tax efficient;
- Consider making gifts before you die – that way you can be certain that they are made right, and you get to see your donation in action.

## **Lapses**

A lot can happen between the time you make your will and when you die. In particular, some of your beneficiaries may pre-decease you. Do not assume that everyone younger than you will outlive you. It is very important to structure your legacies in a manner that provides clearly, for all aspects of the estate, what happens if any beneficiary pre-deceases you. If you do not, you risk creating a partial intestacy for your estate.

# RETENTION, REVOCATION, DESTRUCTION

## Retention

There should only be one original of a will, and it is very important to file the original when applying for probate. Therefore, it is very important to keep the original will in a safe place where it can be easily located when needed.

There are three options:

- Keep it yourself. If you choose this option, you should file the original will in a safety deposit box, safe, or similar location.
- Leave it with your lawyer. This was the norm at one time. It has advantages (safe keeping and security) but in light of people's mobility and longevity, is not without some downsides. The key question to ask yourself is whether, under the circumstances, it is realistic to assume that when the will is needed the survivors will be able to locate the lawyer or law firm that has custody of the original will?
- Deposit it with the Court. For \$20, you can deposit an original will for safe keeping with the Courts in Ontario. We think that this is a very interesting option, especially if you tell folks what you have done.

## Revocation

Unless you are doing 'multiple wills' (see Multiple Wills, below), generally you should revoke all prior wills when you make a new one. Revocation should be done expressly in the text of the new will.

## Destruction

A will that is destroyed by the testator is revoked. You can revoke a will by tearing it, burning it, or the like. Generally, if you make a new will you may wish to destroy previous ones. However, if there is any concern about the validity of a new will, then retaining a prior valid will can be helpful.

## Loss

Normally, only an original will can be probated. If the original has been lost, the presumption is that the testator destroyed it and thereby revoked it. This presumption can be overcome, but with considerable difficulty. If a will cannot be located, it is common to advertise, especially to local lawyers, to try to locate it. It is very difficult to deal with a lost or misplaced will, and thus it is very important to keep original wills in a safe location while also ensuring that they can be located when required.

## MULTIPLE WILLS

You should only have one original of each will that deals with any given asset. However, it is not uncommon to have more than one will, with the different wills dealing with different assets. This technique is particularly useful for:

- Reducing probate taxes. For instance, some assets, such as shares in a private company, often do not require probate and yet can be very valuable. If these assets are dealt with in one will that is not probated, the other assets (for instance real estate) that do require probate can be dealt with in another will. Probate taxes are only payable on the value of the assets covered by the will that is probated.
- Dealing with assets in another jurisdiction. If you own property in Ontario and property in Florida, it is quite possible that it would be best to have two separate wills. You may even have two separate executors. This may make getting probate in each jurisdiction and administration of each estate simpler.

Obviously, it requires some finesse to properly draft multiple wills. In particular, it is very important to make it very clear which will deals with which assets, to make sure that all assets are dealt with, that the overall disposition of the estate to beneficiaries meets your intentions, to ensure that each will is valid and enforceable in the jurisdiction where it applies (no point following Ontario law for a will that will govern assets in Greece) and to ensure that one will does not revoke the other(s).



# SIGNING WILLS THE RIGHT WAY

## Handwritten (holograph) wills

You can create a valid will if you write the entire document in your own handwriting, date it, and sign it. Do not put any additional gifts or instructions below your signature. Handwritten wills do not require witnessing.

## Typewritten wills

In Ontario, a typewritten will must be:

- Signed by the testator
- Witnessed by two witnesses who
  - o were present when the testator signed; and,
  - o Are not the executor, or a beneficiary, or the spouse of any executor or beneficiary.

It is good practice to have the testator and the witnesses initial each page of the will, and to identify the name, address and occupation of both witnesses.

When it comes time to probate the will, an affidavit of execution is required. This affidavit should be sworn by one of the witnesses, and it should be sworn at the time the will is signed by the testator – otherwise, someone has to try to track down the witnesses years after the fact. The original will should be stamped on the back of the last page and identified as an exhibit to the affidavit of execution.

### About Us

**We are Miltons Estates Law**

**Ottawa-based, Ontario wills & estates lawyers.**

Learn more: [www.ontario-probate.ca](http://www.ontario-probate.ca)